

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DALE JOSEPH CLARK,

Defendant-Appellant.

UNPUBLISHED

October 2, 2003

No. 240139

Saginaw Circuit Court

LC No. 01-019966-FH

Before: Sawyer, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from his jury-trial convictions of receiving and concealing stolen property, MCL 750.535(3)(a) (value of the stolen property is greater than \$1,000, but less than \$20,000), felon in possession of a firearm, MCL 750.224f, and possession of marijuana, MCL 333.7403(2)(d).¹ The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to concurrent sentences of 15 to 25 years' imprisonment for the receiving-and-concealing conviction, 15 to 25 years' imprisonment for the felon-in-possession conviction, and one year imprisonment for the possession-of-marijuana conviction. We affirm.

Defendant first argues that his right to a fair trial was violated by the prosecutor's presentation of evidence that defendant was previously convicted of two felony offenses. Defendant failed to object to the admission of evidence of his prior convictions, so defendant must establish that outcome-determinative plain error occurred. *People v Carines*, 460 Mich 750, 752-753, 763; 597 NW2d 130 (1999).

Defendant was charged with being a felon in possession of a firearm. MCL 750.224f. The prosecutor presented the testimony of defendant's parole agent to prove defendant was a convicted felon. In *People v Swint*, 225 Mich App 353, 377-379; 572 NW2d 666 (1997), this Court held that where a defendant offers to stipulate to the fact of the prior conviction, it is an abuse of discretion for the trial court to reject the stipulation and permit the prosecutor to present evidence of the prior conviction to the jury. However, in contrast, defendant here did not offer to

¹ Defendant was acquitted of first-degree home invasion, MCL 750.110a(2), and conspiracy to commit that offense, MCL 750.157a, and of second-degree home invasion, MCL 750.110a(3).

stipulate to his prior convictions. See also *People v Green*, 228 Mich App 684, 691-692; 580 NW2d 444 (1998) (concerning adequate safeguards when the defendant is charged with felon-in-possession and other charges arising from the same incident). “In the absence of any evidence that defendant offered to admit or stipulate his prior felony conviction, the prosecutor was within his right to introduce the challenged evidence.” *People v Nimeth*, 236 Mich App 616, 627; 601 NW2d 393 (1999) (citation omitted); see also *People v Mayfield*, 221 Mich App 656, 661; 562 NW2d 272 (1997). Furthermore, defendant admitted that he possessed stolen property, and testimony indicated that he was involved in the sale of the stolen guns. The trial court gave the jury limiting instructions with respect to the information concerning defendant’s prior felony convictions, and the jury acquitted defendant of the two home invasion charges and the conspiracy to commit home invasion charge. Defendant has failed to demonstrate outcome-determinative plain error.

Defendant next contends that the trial court abused its discretion in refusing to dismiss the jury panel during voir dire when the court learned that one of the prospective jurors had informed some of the other jurors that he knew defendant, his codefendant, and some of the witnesses. Both the United States and Michigan Constitutions guarantee a criminal defendant a fair trial by an impartial jury. US Const, Am VI; Const 1963, art 1, § 20; *Duncan v. Louisiana*, 391 US 145, 149; 88 S Ct 1444; 20 L Ed 2d 491 (1968); *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994). This Court reviews the trial court’s decisions regarding the conduct and scope of voir dire, or whether a juror should be removed, for an abuse of discretion. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001); *People v Taylor*, 195 Mich App 57, 59; 489 NW2d 99 (1992).

The trial court did not abuse its discretion in refusing to strike the jury panel. The trial court conducted a lengthy, individualized inquiry of the prospective jurors regarding the comments and determined that none of the jurors was influenced by them. Five of the six jurors who overheard the comments were subsequently excused and were not on the final jury. The sixth juror was left on the jury and that juror had expressed that he drew no inference from the prospective juror’s comments and that he could be fair and impartial. Moreover, defendant has failed to demonstrate any prejudice because the jurors acquitted him of the two home invasion charges and the conspiracy charge, thereby demonstrating that they could evaluate the evidence free from bias.

Defendant next contends, in essence, that the trial court abused its discretion by denying his request for a mistrial when his former parole agent informed the jury that defendant’s parole had been violated. This remark was an unanticipated answer to a proper question and generally such answers are not grounds for a mistrial. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). The brief mention that defendant’s parole had been violated caused him no significant prejudice. Therefore, the trial court’s decision not to grant a mistrial based on the parole agent’s unresponsive, volunteered answer did not constitute a ruling that was so grossly in error that it deprived defendant of a fair trial or amounted to a miscarriage of justice. *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999) (whether to grant mistrial is within the trial court’s discretion, and absent prejudice, reversal is not warranted).

Defendant also claims that error occurred when a police detective testified that someone else had pleaded guilty to receiving and concealing a shotgun stolen in one of the burglaries. Defendant did not object to this testimony so we review this claim for outcome-determinative

plain error. *Carines, supra*. Defendant argues that this testimony would make it more probable that the jury would conclude that if someone admitted to illegal possession of the stolen shotgun, defendant must have stolen the weapon. However, this argument fails because the jury acquitted defendant of the home invasion charges so it could not have used the information regarding the guilty plea to infer that defendant stole the shotgun. Furthermore, this testimony tended to reinforce defendant's claim that he had nothing to do with the home invasions or the receiving and concealing stolen property charge. Defendant has failed to show outcome-determinative plain error.

Defendant next contends that the prosecutor committed misconduct by eliciting testimony concerning, and making repeated references to, a burglary that occurred in a neighboring county. Because defendant did not preserve these arguments, he must demonstrate outcome-determinative plain error. *Carines, supra* at 763. The prosecutor was entitled to present the "whole picture" of the criminal transaction. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). The prosecutor properly presented evidence regarding this burglary because items stolen in that home invasion were either found in defendant's possession or there was testimony that he was involved in their sale. Moreover, defendant has failed to demonstrate any prejudice. He was not charged with the out-of-county home invasion, so no charge regarding that offense was submitted to the jury, and the jury was specifically instructed that defendant was not charged with that offense. Additionally, as we have noted, defendant was acquitted of the home invasion charges that were brought against him. Defendant has therefore failed to demonstrate outcome-determinative plain error.

Defendant also argues that the trial court erred in refusing defendant's request to recuse itself because it had taken a guilty plea from a codefendant. Unless defendant could establish actual bias or prejudice on the judge's part against either defendant or his attorney, the trial court was not required to disqualify itself. *Wells, supra* at 391. Here, while the trial court presided over the *codefendant's* guilty plea, and subsequently presided over defendant's and his codefendant's joint *jury* trial, it made no determination of defendant's guilt – that determination was made by the jury. Defendant does not point to any evidence of personal bias or prejudice by the trial court. See *People v Cocuzza*, 413 Mich 78, 79; 318 NW2d 465 (1982) (trial court not required to sua sponte disqualify itself from conducting the defendant's bench trial where it had previously presided over the defendant's incomplete attempt to plead guilty). Defendant has failed to overcome the presumption of judicial impartiality and the trial court did not abuse its discretion in denying defendant's disqualification motion. *Wells, supra*.

Defendant finally claims that the trial court incorrectly scored prior record variable (PRV) 7 and offense variables (OV) 9 and 13 of the sentencing guidelines. Defendant preserved this issue by objecting to the court's scoring at sentencing. MCL 769.34(10); *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000). This Court reviews the trial court's guidelines scoring decision to determine whether it was supported by the evidence. *Id.* at 349.

Defendant first challenges the trial court's decision to score ten points for PRV 7, MCL 777.57. Defendant argues that this score was incorrect because he was going to receive a consecutive sentence for his parole violation and the instructions for PRV 7 state: "Do not score a concurrent felony conviction if a mandatory consecutive sentence ... will result from that conviction." MCL 777.57(2)(c). The trial court ruled that the instruction only applied where the

defendant was being sentenced for a number of crimes, at least one of which was consecutive to the others; it did not apply where concurrent crimes might be subject to consecutive sentencing with regard to a separate parole violation proceeding. We agree with the trial court's interpretation.

First, defendant fails to cite any authority in support of his argument. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give [an issue] only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Additionally, defendant's argument does not correctly evaluate the language of the PRV 7 instruction, which commands the trial court not to "score *a concurrent felony conviction* if a mandatory consecutive sentence ... will result *from that conviction*." MCL 777.57(2)(c) (emphasis added). Defendant had two concurrent felony convictions: receiving and concealing stolen property and felon in possession of a firearm. A mandatory consecutive sentence did not result from either of those concurrent convictions; the consecutive sentence resulted from a *separate* parole violation proceeding. Therefore, the trial court correctly interpreted the plain language of the PRV 7 instruction and scored ten points for PRV 7 based on defendant's concurrent felony convictions.

Defendant next challenges the trial court's scoring of ten points for OV 9, MCL 777.39, concerning the number of victims. Defendant contends he was only convicted of one count of receiving and concealing and therefore there was only one victim. The trial court disagreed and noted that he was found in possession of items from each of the three home invasions, so there were at least three victims. Defendant argues on appeal that OV 9 does not apply to victims of monetary loss, but rather to "victims close to the event." However, in *People v Knowles*, 256 Mich App 53, 61-63; 662 NW2d 824 (2003), this Court upheld that scoring of ten points for OV 9 where the trial court counted a credit union as one of the two victims because the credit union lost the use of \$225 for a period of time. The *Knowles* decision supports the trial court's decision to count the three individuals whose homes were burglarized as victims because property was stolen from them that was later found in defendant's possession.

Finally, defendant contends that OV 13, MCL 777.43, concerning continuing pattern of criminal behavior, was incorrectly scored at twenty-five points. A score of twenty-five points requires a determination that "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(b). The instructions for OV 13 provide that: "For determining the appropriate points under this variable, all crimes within a five-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). The trial court concluded that defendant was involved in the three home invasions and therefore, under the instructions, twenty-five points could be scored despite the fact that defendant was not convicted of these offenses. We agree.

In *People v McDaniel*, 256 Mich App 165 172-173; 662 NW2d 101 (2003), this Court held that the five-year period referred to in MCL 777.43(2)(a) could be *any* five-year period in which the defendant committed three or more crimes against a person. In *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001), this Court held that OV 13 could be scored for twenty-five points where the defendant was convicted of four concurrent felonies. In the present case, the trial court found that defendant was involved in three home invasions. These offenses

were essentially concurrent and they clearly occurred within a five-year period. While defendant pointed out that he had not been convicted of those offenses, the instructions make it plain that they may be scored “regardless of whether the offense resulted in a conviction.” MCL 777.43(2)(a). We therefore conclude that the trial court did not abuse its scoring discretion by scoring twenty-five points for OV 13.

Affirmed.

/s/ David H. Sawyer

/s/ Joel P. Hoekstra

/s/ Christopher M. Murray